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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROY B. COLLINS, et al.,

Plaintiffs and Appellants,

v.

CISTERRA PARTNERS, LLC, et al.,

Defendants and Respondents.

D057994 (consolidated with
D058961)

(Super. Ct. No. 37-2009-00100563-
CU-FR-CTL)

CONSOLIDATED APPEALS from a judgment and orders of the Superior Court
of San Diego County, Ronald S. Prager, Judge. Reversed.

Plaintiffs and appellants Roy B. Collins (Collins) and his affiliated company
Roy B. Collins, Inc. (Collins, Inc.; together Collins) appeal the trial court's order granting
a special motion to strike and the judgment dismissing their complaint for damages and
restitution. (Code Civ. Proc., § 425.16.)¹ This anti-SLAPP motion was brought by

¹ All further statutory references are to the Code of Civil Procedure unless otherwise
specified. The acronym SLAPP has been widely adopted to describe lawsuits affecting

former business associates of Collins, defendants and respondents, Cisterra Partners, LLC (Cisterra) and its principals, Steven Black (Black), and Todd Anson (Anson, sometimes referred to here as Respondents).

The legal status and ownership of an additional defendant and respondent, Nobel Research Park LLC (NRP), are the chief subjects of Collins's complaint against all Respondents. Collins claims that in a complicated series of real estate and business transactions that resulted in years of litigation, Respondents defrauded him out of his one-third ownership of NRP (originally a joint venture) and ultimately, took his share of NRP's valuable lost profits award (after Cisterra obtained a jury verdict and settlement after appeal, in a separate action against a third party, The Irvine Company [Irvine is not a party here]).²

To support this claim to a share of NRP assets, Collins relies on a 1999 oral agreement reached between himself (and/or his company Collins, Inc.), Black and Anson (and/or their company Cisterra) to form an operating entity for that joint venture, to be called NRP, for carrying out the purchase, development, and sale of certain property (the Nobel Property), with Cisterra to act as its alter ego, but only for a limited time and for limited purposes. Collins claims he fully participated in the business of the joint venture,

speech or petition rights (Strategic Lawsuit Against Public Participation). (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1.)

² *Cisterra v. Irvine* (Super Ct. San Diego County, 2002, No. GIC 783959) (Irvine action.)

but during the ongoing transactions, Black, Anson and Cisterra allegedly secretly formalized NRP as a limited liability company, and also amended its oral operating agreement, both of which excluded him and wrongfully breached the joint venture agreement and fiduciary duties.

In their special motion to strike, Respondents attacked the complaint as based solely or principally on protected petitioning conduct, i.e., a 2006 stipulation Cisterra (then a plaintiff) reached in the Irvine action to dismiss NRP as its coplaintiff from the litigation, for lack of standing. In turn, that 2006 stipulation was based on a transactional and litigation background that included two 2001 settlement and release agreements involving Collins, Cisterra, and SDP, that stemmed from the related litigation that arose from SDP's termination of its March 5, 2000 purchase and sale agreement of the Nobel Property to Cisterra.³

The trial court accepted Respondents' arguments and granted their special motion to strike the complaint. The court ruled that the challenged conduct by Respondents, relating to the 2006 stipulation and the 2001 settlements, was on the face of the record entitled to the benefits of section 425.16, because it fell within the statutory language that defines protected communications in litigation and related petitioning activity. (§ 425.16, subds. (e)(1) & (2).)

³ *Cisterra v. Gregg* (Super. Ct. San Diego County, 2000, No. GIC 746055) (SDP action). SDP stands for San Dieguito Partnership, with which Collins was formerly affiliated.

In addition to those conclusions, the trial court ruled in favor of Respondents on the second portion of the statutory test under the anti-SLAPP statute, i.e., the court decided that Collins did not carry his burden of establishing a probability that he will prevail on his claims. (§ 425.16, subd. (b)(1).) The court made findings that the 2001 settlements' binding releases applied to and barred this litigation, and in addition, litigation privilege applied to those previous settlement discussions (Civ. Code, § 47, subd. (b)), and/or each of the six causes of action was barred by its applicable statute of limitations.

Collins appeals, arguing the trial court erred as a matter of law when finding the anti-SLAPP statute was applicable by its terms, and the court mistakenly concluded that "but for" the stipulation in 2006, Collins would never have been injured. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-90 (*Navellier*).) Instead, Collins claims that the heart of his causes of action is not petitioning or litigation activity, but it is found in the underlying facts pled about how Respondents previously wrongfully withheld from him certain critical information about the formation and operation of NRP, and Cisterra's dealings with Irvine, all contrary to their obligations as his fellow joint venturers and fiduciaries. He contends this actionable conduct began before the time of the original purchase agreement and continued throughout the subsequent, successful lawsuit against Irvine for lost profits, until the present, at all times depriving him of his joint venture interest. Collins further appeals the order awarding attorney fees to Respondents. (§ 425.16, subd. (c).) The appeals have been consolidated for disposition.

Where a plaintiff pleads causes of action that are related to or associated with earlier litigation-related activities, the courts must closely examine which acts in that process gave rise to the asserted claims, for purposes of applying the anti-SLAPP statute. (*Navellier, supra*, 29 Cal.4th at pp. 88-95.) By identifying the principal thrust of the claim, in terms of any "allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim," the applicability of the anti-SLAPP statutory scheme can be determined. (*Martinez v. Metabolife International, Inc.* (2003) 113 Cal.App.4th 181, 189 (*Martinez*).) If the core injury-producing conduct by the defendant that allegedly gave rise to the plaintiff's claim is properly described with only collateral or incidental allusions to protected activity, then the claim does not arise out of protected speech or petitioning activity, and the special motion to strike authorized by the anti-SLAPP statute should not be granted. (*Id.* at p. 188.)

On de novo review, we agree with Collins on the first prong of the applicable test that the face of the complaint alleges additional and materially different acts that "gave rise to the asserted claims," distinct from protected petitioning conduct. The complaint principally alleges breaches of fiduciary duty and tortious conduct that are independent from those protected elements of the claims that actually were litigation-based communications. The anti-SLAPP statutory protections do not clearly apply as a matter of law to these mixed causes of action. (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103-106 (*Mann*).)

Because of that conclusion, this court need not reach the second portion of the statutory test under the anti-SLAPP statute, i.e., whether Collins can establish a probability that he will prevail on his claims. (§ 425.16, subd. (b)(1); *Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1271 (*Hylton*).) At the present time, there is no basis to uphold the separately appealed award of attorney fees. We reverse the judgment and orders.

FACTUAL AND PROCEDURAL BACKGROUND

For purposes of anti-SLAPP analysis, we accept as true the facts averred by Collins, and here, outline the transactions in a highly abbreviated manner. (See *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 733 (*Freeman*).) The moving parties' evidence is considered for whether it defeats, as a matter of law, the evidence submitted by Collins. (*Hylton, supra*, 177 Cal.App.4th 1264, 1267.) We emphasize that the purpose of this opinion is not to resolve the merits of the overall dispute, but rather to determine whether the anti-SLAPP statutory scheme properly and objectively applies to this set of allegations in the complaint and declarations, concerning the parties' interactions and the gravamen of the claims.

A. Nature of Disputes; Identity of Parties

Back in the 1980s-1990s, Collins was the president and a director of San Dieguito Valley, Inc. (SDVI), a company which served as the general partner of a real estate limited partnership, SDP. By 1999, SDP owned commercial real estate, the Nobel Property, and wanted to sell it. Collins individually was a proposed buyer-developer

from SDP, but needed associates and financing, so he consulted Black, another real estate developer. Black and Anson formed Cisterra around July 1999. By June 1999, Collins, Black and Anson (with or without utilizing their respective companies) had orally agreed to form a joint venture entity to purchase, develop, and sell the Nobel Property.

Around October 1999, Collins prepared a purchase proposal for the joint venture, to be called NRP, and he presented it to the board of SDP's general partner (SDVI, of which he was president, but he abstained from voting). He or his company anticipated receiving a commission as an independent contractor, and Cisterra was also to receive a fee.⁴ The SDVI Board conditionally approved the proposal (although SDP did not formally approve it until January 21, 2000, and the purchase agreement documents were not executed until March 5, 2000).

Meanwhile, at the beginning of November 1999, Collins, Black and Anson were in agreement that the NRP joint venture would be entitled to 40 percent of profits, and the remaining 60 percent would go to a financial partner to be obtained later. They also orally agreed to form an operating entity for the joint venture, and that until its oral formation was documented, Cisterra would act as its alter ego for carrying out the business of the joint venture. Collins understood from the other joint venturers that once

⁴ Collins individually and Collins, Inc., his solely owned real estate corporation, make the same arguments on appeal, although they played somewhat different roles at different times during these transactions from 1999 forward. We need not distinguish between them for purposes of anti-SLAPP analysis.

the NRP entity was formed, Cisterra would assign to it all its rights under the purchase agreement.

However, Collins alleges that Black and Anson secretly amended the oral operating agreement, to exclude him. They documented the formation of NRP by incorporating it as a limited liability company, effective November 9, 1999, but they did not disclose this to Collins, instead sending him only a draft incorporation agreement November 15, 1999. Further, Respondents exclusively used Cisterra to pursue the proposed joint venture sales and development deal during the period that SDP approval was pending. SDP approval was obtained January 21, 2000, for the joint venture to buy the property for \$14 million, and a purchase agreement was executed March 5, 2000. Collins, Black, and Anson each paid one third of the \$250,000 earnest money deposit for the purchase agreement, and one third of the \$600,000 required for purchasing an assignment of the rights of first refusal held by some of the SDP limited partner/owners (the Gregg family).

In seeking to obtain a financial partner, Cisterra hired a consultant, Mr. Birks, who used some of Collins's information to prepare an informational package to present in January 2000 to proposed financial partners, such as Irvine. Cisterra created a confidentiality agreement to go with the package, and Irvine agreed to it in February 2000. Importantly, Cisterra was the only party to the confidentiality agreement besides Irvine. No mention was made of NRP or Collins as proposed purchasers.

Irvine approached some of the other SDP partner/owners, seeking to purchase the property for itself. It was ultimately determined (at jury trial in 2006 in the Irvine action) that Irvine had breached the confidentiality agreement in doing so. The purchase agreement negotiated by Cisterra, on behalf of the joint venture and/or NRP, fell through on April 3, 2000, when SDVI, on behalf of SDP, canceled the agreement (nominally due to ineffective assignment of rights of first refusal). Ultimately, the Nobel property was purchased by a third party not involved in this litigation, IDEC.

Extensive previous litigation began in 2000, when Cisterra first sued the Greggs, and then amended the complaint to add SDP and others, to enforce the March 5, 2000 purchase agreement. At that time, Collins was assisting SDP and SDVI in defending the Cisterra allegations, but he was not a named party. In 2001, the resolution of that litigation involved Collins being added as an individual party at the settlement and release stage, and he entered into two separate agreements in March and November 2001. In his declaration, Collins states the purpose of his entering into those settlement agreements individually was simply to put an end to the disputes between Cisterra and SDP, as that was important to SDP. The March 2001 settlement related to the main SDP/Cisterra dispute, about the failed purchase agreement, and it included related releases and waivers (hotly disputed now). (Civ. Code, § 1542.) The agreement carved out from its scope a remaining dispute between Cisterra and Collins about how to reallocate the Collins contribution of one third of the \$600,000 Cisterra paid to the Greggs to buy an assignment of their right of first refusal for the Nobel Property. An

additional "carve-out" stated that Irvine would not be released or discharged, although it was not a party in that SDP action.⁵

Under the November 2001 agreement to resolve that remaining dispute in the SDP action, Collins received a refund of a portion of the \$200,000 he paid to the Greggs (less litigation expenses Cisterra had expended against SDP), as will be discussed later. (Part IIIB, *post.*) Thus, Collins accepted \$140,000 from Cisterra to resolve that claim, and made related releases and waivers (hotly disputed now). (Civ. Code, § 1542.)⁶

Ultimately, after motion practice and an appellate writ of mandate proceeding in the SDP action, SDP settled with and paid Cisterra \$3.2 million to go away (so it could sell to IDEC).

⁵ The March 2001 release in the SDP action is mutual in nature and reads in relevant part as follows: "SDP, SDVI, [and others] and Collins, for themselves, their successors, . . . fully and forever RELEASE and DISCHARGE Cisterra, and its . . . joint venturers (including [NRP]) . . . from all claims, actions . . . whatsoever (contingent, accrued, matured, direct, derivative, subrogated, personal, assigned, discovered, undiscovered, inchoate or otherwise) which Cisterra may now have, have had, or which may hereafter accrue, . . . in connection with, relating to, or arising out of (a) the Action (b) the Purchase Agreement, or (c) the Nobel Property, *except that the parties in no way release or discharge the Greggs or The Irvine Company* [thus reserving the allocation of funds paid to the Greggs for later resolution]." (Italics added.)

⁶ The November 2001 agreement in the SDP action included a "Mutual General Release of Parties" that stated in relevant part the following: "Collins hereby generally releases Cisterra and all of its members . . . , from all claims, whether past, present, or future, for all liability for damages or other relief arising directly or indirectly from, related to, or sustained by reason of any of the above-referenced Dispute and any other prior dealings between Cisterra and Collins."

The next phase of the litigation ensued when Cisterra sued Irvine in 2002, claiming that Cisterra was entitled to lost profits because Irvine had used Cisterra materials to separately approach SDP, thus breaching the confidentiality clause and therefore interfering with the Cisterra/NRP/SDP sales opportunity. In a 2005 amended complaint, NRP was added as a provisional plaintiff, due to ongoing questions about standing to obtain lost profits against Irvine under the confidentiality clause. The resolution of the standing issue in the Irvine action involved Cisterra and Irvine stipulating in October 2006 to dismiss NRP as a coplaintiff, as will be further discussed later. (Part IIIA, *post.*)

In December 2006, Cisterra won a \$37.5 million verdict for lost profits against Irvine. After Irvine appealed, the matter was settled for an undisclosed sum in 2009. In October 2006, Collins had testified as a witness during the Irvine action, and he claims he did not learn until that time that Cisterra had utilized his materials in approaching Irvine, confidentially. He also claims that he reviewed those trial materials in 2007, discovering the basis for his current action (to recover surviving NRP assets from Respondents).

In this action filed in 2009, Collins pleads a number of theories to obtain payment of what he believes is his one-third share, through the NRP joint venture, of that lost profits award that Irvine was ultimately required to pay to Cisterra (as the sole surviving plaintiff in the separate Irvine action). Collins's claims hinge upon Respondents' failure to include NRP and Collins as parties to the confidentiality agreement that was integral to the Cisterra-Irvine transactions, that Irvine breached, and that ultimately gave rise to the

damages award against Irvine (representing the 40 percent lost profits that NRP would have earned).

As against Respondents Cisterra, Black, and Anson, Collins brings six causes of action for "money had and received," unjust enrichment, violation of the Uniform Fraudulent Transfer Act (Civ. Code, § 3439 et seq.), constructive fraud, breach of fiduciary duty, and fraud in the inducement. Restitution and damages are sought.

As against Respondent NRP, only one cause of action is claimed, violation of the Uniform Fraudulent Transfer Act. Additional relief sought from all Respondents is to have the transfer of a portion of the NRP claim or assets involved in the Irvine case, that are held by Cisterra, Black and Anson, to be ordered set aside and voided as to Collins, thus enabling Collins to recover his rightful share of NRP. (Civ. Code, § 3439 et seq.)

B. Special Motion to Strike; Response

In response to the complaint, Respondents filed their special motion to strike, arguing that they met their threshold burden of showing that the complaint sought to pursue only claims that arose from statements made in judicial proceedings (the 2006 stipulation and the 2001 settlements), and therefore the underlying conduct constituted protected petitioning activity within the meaning of the anti-SLAPP statute. Respondents argued that under the second prong of the analysis, the burden had been shifted to Collins to show his probable success on the merits, but he could not meet that burden due to various meritorious defenses to his complaint, such as litigation privilege (Civ. Code, § 47, subd. (b)), bars of the settlements and releases, and statute of limitations bars. In

support of their motion, Respondents submitted numerous lodged documents, including the pleadings and correspondence in the SDP action about the 2001 settlements and releases.⁷

In opposition, Collins argued that Respondents' alleged conduct underlying all the causes of action could not constitute protected petitioning or litigation activity within the meaning of the anti-SLAPP definitions. Rather, Collins was asserting that the injury-causing conduct by Respondents was their breaches of fiduciary obligations, arising from and in connection with the oral joint venture and operating agreement, beginning in 1999 and continuing to the present. He claimed they had fraudulently induced him to participate in the 2001 release transactions, by failing to disclose all relevant facts and circumstances to him, about a remaining NRP role in the Irvine transactions. With respect to the 2006 stipulation, Collins argued it was merely evidentiary in nature, further demonstrating that fiduciary breaches by Respondents had taken place, as well as fraudulent transfer of assets from one entity to another.

Collins supplied lodged documents showing the history of the transactions, including the February 2000 confidentiality agreement that Cisterra obtained from Irvine, while Cisterra was pursuing the agreement with SDP. Collins provided copies of the November 9, 1999 documentation of formation of NRP, LLC, as well as the transmittal to him on November 15, 1999 of a draft operating agreement for such an entity. Collins

⁷ Apparently, a cross-complaint was filed and demurrers to it were also on calendar, but they were taken off calendar. We need not discuss them here.

also included excerpts from trial testimony from Respondents and other witnesses in the underlying Irvine litigation, showing that they acknowledged that Collins had participated in NRP business.

In Collins's declaration, he stated that the joint venture agreement required Cisterra, upon the legal formation of NRP on November 9, 1999, to immediately transfer all its rights and interests in the Nobel Property to NRP. He disputed the characterization by Respondents that the 2001 settlement and releases somehow divested him of all his interests in NRP, because material facts affecting those agreements had been concealed from him. He further contended that none of the proposed defenses was legitimate, and he could show his probability of prevailing in the action.

In reply, Respondents filed evidentiary objections against portions of Collins's declaration, and against the excerpts he provided from points and authorities on motions in limine in the Irvine action. Respondents argued those materials lacked foundation, represented improper conclusions or argument, or were misleading. In the trial court's detailed ruling, these objections were sustained in part and overruled in part.⁸

⁸ On appeal, Collins points to several of these evidentiary rulings as being erroneous, but he also admits that the statements that were stricken are not critical to his case, particularly with respect to his first argument (whether his allegations arose from protected petitioning conduct). As will be explained, we do not find it necessary to address those evidentiary issues in detail, since the broader picture adequately presented by the record requires us to reverse the rulings.

C. Trial Court's Rulings

At argument on the motion, the trial court and counsel acknowledged that Collins had played varying roles in the purchase agreement set of transactions that were litigated, since he was part of the NRP effort to buy the property, but he was also an officer of SDVI, the general partner of the seller SDP, that was sued by Cisterra. The court and counsel discussed how Collins, on behalf of SDP as the seller, appeared to be adverse to Cisterra at times.⁹ However, although counsel for Collins acknowledged that there was such a "dual relationship," he said it was always disclosed and obvious to all, and thus he continued to contend that Collins and Cisterra were not truly adverse in interest while the SDP sales effort was still going on, nor were they in 2001 when the settlements were reached and Cisterra returned a portion of Collins's advanced funds to him (less litigation expenses). Thus, counsel for Collins characterized the wrong in this case as Respondents' "keeping money that happened in the spring or late winter of 2009," money that had been fraudulently taken from Collins and NRP by incremental steps, such as the 2001 settlements and releases and the 2006 stipulation.

⁹ The parties debate whether Collins served as the president or the chairman of the board of SDVI, and they argue conflicting positions about how involved Collins was in the Cisterra transactions with SDP, for which SDP eventually paid Cisterra a settlement of \$3.2 million. We need not resolve that factual dispute here, as it is not dispositive of the anti-SLAPP issues regarding protected petitioning conduct. We also note that Judge Prager, who ruled on this motion, had earlier served as the trial judge in the underlying litigation between Cisterra and Irvine, and the record reflects that in that capacity, he had accepted Cisterra's plan to dismiss NRP as a coplaintiff, which was presented in terms of lost profit damages theories and standing.

At the argument on the motion, Respondents contended that the 2001 releases effectively ended all relationships between Collins, Respondents, and SDP. The 2006 stipulation resolved issues about which party plaintiffs had standing, Cisterra or NRP, and Respondents agreed to remove NRP from the lawsuit because it was not a proper plaintiff, based upon their lost profits theories.¹⁰

After taking the matter under submission, the court issued an order granting Respondents' motion to strike all causes of action. The court initially considered the appropriate criterion of identifying "the principal thrust or gravamen of the plaintiff's cause of action," to determine whether the anti-SLAPP statute applied. (*Martinez, supra*, 113 Cal.App.4th 181, 188.) The court acknowledged that if the allegations referring to arguably protected activity are only incidental or collateral to a cause of action, which is otherwise based essentially on nonprotected activity, the anti-SLAPP statutory scheme should not apply.

The court reviewed the pleadings, supporting declarations and lodged documents outlining the facts upon which liability or defenses were based, and discussed whether the 2001 settlement agreements and the 2006 stipulation were central to each claim. The court ruled, "[a] review of the Complaint indicates that each of the causes of action arise

¹⁰ At argument on this motion, counsel for Respondents told the trial court that as of 2006, NRP had not been fully formed or operational as a development entity, because it had not yet brought in a financial partner, and counsel used this fact to explain why NRP was dismissed from the Irvine action. To the contrary, Collins takes the position that the original NRP remained viable, but that Cisterra also formed a "New NRP." Any issues of the viability of NRP as an operational entity are beyond the scope of this opinion, which deals with anti-SLAPP issues only.

from [Collins's] alleged loss of one-third of the money judgment obtained in the Irvine case due primarily to a stipulation entered into by Cisterra and Irvine in which they agreed to dismiss NRP as a party and to no offset for NRP in any damages award against Irvine. [Collins] also alleges that [his] ability to assert claims against Cisterra is being hindered by the existence of the settlement agreements." From those facts, the court concluded that Collins was mistakenly focusing upon "the form of his claims rather than the injury-producing conduct upon which they are based. For example, [Collins] contends that the gravamen of [his] UFTA claim is based on the unlawful transfer of assets. However, the Complaint itself indicates that the transfer was accomplished by the stipulation. [His] claims also contain allegations of both protected and unprotected activity."

The court concluded that the settlements and stipulation were "central" to each claim, rather than incidental, and therefore, Respondents were deemed to have met their burden of showing that the challenged claims "arise from protected activity."

Next, assuming that Collins properly would be required to demonstrate a probability of prevailing on any part of his claims, the court found that they all failed, because they had been "released . . . in two settlement agreements in 2001." Even if Collins's claims did not fail solely because of those releases, they would fail based on the litigation privilege, and also because they were time barred.

In separate proceedings, Respondents received a substantial award of attorney fees and costs. (§ 425.16, subd. (c).) Collins filed notices of appeal challenging the trial court's rulings on the motion to strike, the judgment, and the fees request.

DISCUSSION

In its ruling, the trial court identified the 2006 stipulation, and the underlying 2001 settlement and release agreements, as each central to Collins's claims and thus supporting the application of the anti-SLAPP statute. In the briefing, the parties treat the 2001 agreements as mainly relevant to the second prong of the anti-SLAPP analysis (probability of prevailing), but in any case, these issues about litigation conduct are inextricably intertwined. Without reaching the merits, we address each set of court-related activity to determine the gravamen of the claims.

I

INTRODUCTION

Because the procedural and factual background of this litigation is quite complex and Collins's theory of the case is quite complicated, we first seek to clarify the nature of his allegations and from whence they arose. Collins appears to assert that whatever happened in 2001 and 2006, his claims retain viability and were not discovered until 2007. According to Collins, all the previous litigation-related events must be viewed in light of his belief and purported evidence that all Respondents, contrary to their fiduciary duties, "willfully withheld critical information concerning their original formation of

NRP, concerning the scope of Irvine's breach of the Confidentiality Agreement, and concerning the breadth of their intended lawsuit against Irvine. That was fraud"

Respondents, however, take the position that Collins must have released all claims against Cisterra in the 2001 stipulations in the SDP action (including any portion of Cisterra's claims against Irvine). Respondents point to language in the March 2001 stipulations that "carves out" from the releases any claims against the Greggs or Irvine. Later, the November 2001 stipulation resolved the claims concerning the Greggs. However, it is interesting to note that Cisterra never sued Irvine within the SDP action, although it obtained Collins's informal agreement to allow it to do so through an amended pleading, but instead, it ended up suing Irvine separately. When Cisterra sued Irvine in 2002, it did not add NRP as a coplaintiff until November 2005, and dismissed it in October 2006.

From those facts, Cisterra currently argues that Collins always knew that Cisterra was planning to sue Irvine. Collins responds that he did not know there was any basis for such an action, due to his ignorance about the 2000 confidentiality clause and other Cisterra actions that had the effect of excluding him from any NRP rights against Irvine. Collins thus asserts that NRP continues to have assets and interests, and that he can currently pursue Respondents for their "fraud that was surely 'in the works' in 2001, but that was not consummated *until January of 2009* [time of Cisterra's settlement with Irvine, but without allowing for NRP and Collins' interests]." (Italics added.) He claims he did not discover the injury-producing conduct of Respondents until as late as 2007,

and this injury-producing conduct by Respondents included the creation of a "New NRP," that was used by Respondents to his exclusion, as opposed to the original NRP of which he was a one-third joint venturer. He therefore contends the 2006 stipulation in the Irvine action could theoretically have operated in his favor, if Respondents were correctly operating under the original NRP (and would then be distributing one third of the proceeds from the Irvine action to him), so his claims of harm do not arise from protected stipulation activity.

Likewise, as to the 2001 agreements, Collins contends he never released any of the Respondents "from liability for other discrete acts of fraud *that would not be accomplished for another eight years.*" (Italics added.) His theory of the case is that Respondents remain under a duty to honor his participation in the original joint venture agreement, by releasing "his" one third of the monies they obtained from Irvine. He questions whether Respondents had the authority in 2006 to properly dispose of all NRP claims, and whether in 2001, they brought him in as an individual party to the settlements on a fraudulent basis, to conceal some surviving NRP joint venture entitlement. It is that broad set of allegations for which anti-SLAPP applicability is contested here.

II

APPLICABLE STANDARDS

A. Review

In determining whether a challenged lawsuit is a SLAPP: "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action

is one arising from protected activity. [Citation.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause of action fits one of the categories spelled out in section 425.16, subdivision (e)' [citation]." (*Navellier, supra*, 29 Cal.4th 82, 88.)¹¹

On appeal, we review de novo the trial court's ruling on the motion to strike. (*Martinez, supra*, 113 Cal.App.4th 181, 186; *Freeman, supra*, 154 Cal.App.4th 719, 727.) Whether section 425.16 applies to a particular complaint amounts to a legal question that is subject to de novo review. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906.) Normally, if a defendant satisfies the first portion of this test, the trial court must address whether it is reasonably probable the plaintiff will prevail on the merits at trial. (§ 425.16, subd. (b)(1).) However, a court need not reach this second prong of the analysis if the "arising from protected conduct" requirement is not met. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67; *Navellier, supra*, 29 Cal.4th 82, 88-89.)

The statute allows both parties' sets of papers to be considered in ruling on the motion, and the record is replete with pertinent lodged documents relied on by both sides.

¹¹ Section 425.16, subdivision (a) instructs the courts that in making determinations about the scope of subdivision (e), a broad statutory construction is required. Section 425.16, subdivision (e) provides as relevant here: "[An] 'act in furtherance of a person's right of petition or free speech under the . . . Constitution in connection with a public issue' includes: (1) any written or oral statement . . . before a . . . judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement . . . made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law"

(§ 425.16, subd. (b)(2); *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1286 [court examines declarations in first prong analysis under § 425.16].) During review of an anti-SLAPP order, we do not address the relative merits of the parties' claims and defenses, but instead determine only whether the challenged order correctly analyzed the record provided. (*Freeman, supra*, 154 Cal.App.4th 719, 732-733.) "[I]t is not our task to resolve factual disputes or make credibility determinations on [a] section 425.16 motion; we accept plaintiffs' evidence as true for purposes of our analysis." (*Freeman, supra*, at p. 733.) Although Collins complains that Respondents' showing is suspect because they did not submit any declarations from individuals involved in the transactions, the record as a whole suffices to determine whether the stipulation and settlements, protected petitioning conduct, principally or substantially gave rise to the causes of action. (*Martinez, supra*, 113 Cal.App.4th at pp. 188-190.)

B. Mixed Causes of Action

"Where a cause of action refers to both protected and unprotected activity and a plaintiff can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless and will not be subject to the anti-SLAPP procedure." (*Mann, supra*, 120 Cal.App.4th at p. 106; italics added.) As observed by the trial court, Collins's claims contain allegations of both protected and unprotected activity. We next examine its conclusion that the settlements and stipulation were "central," rather than incidental, to each claim, in light of authorities applying this type of analysis to mixed causes of action.

In *Navellier*, the Supreme Court concluded that where the plaintiffs were suing chiefly because the defendant had filed certain counterclaims in federal court, contrary to a previous agreement not to do so, the defendant could rightfully assert that "*but for* the federal lawsuit and [the defendant's] alleged actions taken in connection with that litigation, plaintiffs' present claims would have no basis. This action therefore falls squarely within the ambit of the anti-SLAPP statute's 'arising from' prong." (*Navellier, supra*, 29 Cal.4th at p. 90; italics added.) However, the Supreme Court continued the analysis by finding that even though the plaintiffs had chiefly alleged protected petitioning activity, the defendant could not yet prevail on the anti-SLAPP motion. Instead, the plaintiffs were entitled to make an effort to defeat the motion, by establishing a probability they would prevail on their claim. (*Id.* at p. 95.)

According to the analysis in *Martinez, supra*, 113 Cal.App.4th at page 188, we consider if the arguably protected conduct (stipulation and settlements) substantially gave rise to the injuries that Collins has alleged, or if any protected conduct was only "incidental" or "collateral" to Respondents' allegedly injurious acts during the joint venture transactions. Only if the protected conduct is more than incidental or collateral to the plaintiff's case can the anti-SLAPP statutory scheme apply. (*Id.* at pp. 188-190.) This requires consideration of how Respondents came to be in the position of entering into the 2006 stipulation, and of how Collins came to be in the position of agreeing to the 2001 settlements and releases.

The parties extensively discuss anti-SLAPP case law developed in the context of attorney malpractice allegations. In *Freeman, supra*, 154 Cal.App.4th 719, 729-730, we concluded the gravamen of the plaintiffs-clients' claims was not that the individual defendant (an attorney) had filed or settled certain litigation, but instead, the plaintiffs were theorizing that the defendant had violated fiduciary duties, when undertaking to represent a party that had adverse interests with respect to former clients (plaintiffs). Thus, the allegations concerning the attorney's petitioning activity were deemed incidental to the core claims alleged against the attorney. Even where "[t]here is no doubt plaintiffs' causes of action *have as a major focus*" certain litigation-related activity carried out by the defendant attorney, "the fact plaintiffs' claims are related to or associated with [his] litigation activities is not enough. 'Although a party's litigation-related activities constitute "act[s] in furtherance of a person's right of petition or free speech," it does not follow that any claims associated with those activities are subject to the anti-SLAPP statute.' " (*Ibid.*)

Even where a " 'cause of action may be "triggered by" or associated with a protected act, . . . it does not necessarily mean the cause of action *arises* from that act.' " (*Freeman, supra*, 154 Cal.App.4th at p. 730; see also *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537 [clients' claim against former attorney for malpractice not subject to anti-SLAPP merely because it occurred as "part" of litigation].)

In *Hylton, supra*, 177 Cal.App.4th 1264, 1274-1275, we analyzed a plaintiff's theory that the defendant (an attorney), in the course of litigation, had allegedly violated fiduciary obligations to the plaintiff (in the form of giving false advice that induced plaintiff to pay excessive attorney fees to the defendant). We acknowledged that the plaintiff's claims had "alluded" to the defendant's petitioning activity, as "*part of the evidentiary landscape* within which [plaintiff's] claims arose." (*Id.* at p. 1272.) Nevertheless, the gravamen of the plaintiff's claims was grounded in "nonpetitioning activity inconsistent with his fiduciary obligations" (*Ibid.*) Therefore, that defendant had failed to carry his initial burden of showing the claims against him arose out of protected petitioning activity.

In *Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, former clients of attorney defendants sued the attorney defendants, as well as an expert witness hired by the attorneys, for breach of duties of loyalty and negligent representation. The expert witness brought an anti-SLAPP motion to strike the complaint, contending that the plaintiffs could not recover against him based upon his alleged false deposition testimony (protected litigation conduct) or his alleged breaches of the duty of loyalty (by engaging in a conflicting business arrangement). (*Id.* at pp. 575-579.) The trial court denied the anti-SLAPP motion, and the appellate court affirmed. "It is true that the statute protects litigation-related speech and petitioning activity undertaken on another's behalf [citations]; but the statute should not be used to insulate those statements from recourse by the very client on whose behalf the statement was made." (*Id.* at p. 576.) Thus, the

expert, as a defendant, could not claim that either his "false" deposition testimony or his business relationship (that conflicted with other duties) were protected litigation activities. (Also see *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1227 ["In determining the applicability of the anti-SLAPP statute, we think a distinction must be drawn between (1) clients' causes of action against attorneys based upon the attorneys' acts on behalf of those clients, (2) clients' causes of action against attorneys based upon statements or conduct solely on behalf of different clients, and (3) nonclients' causes of action against attorneys."].)

Such attorney malpractice authorities do not provide an exact parallel to the claims Collins makes here. Respondents contend that Collins's action more closely resembles a malicious prosecution case, and that the anti-SLAPP statutory scheme has been allowed to apply to malicious prosecution cases because they may arise from protected petitioning activity. (See, e.g., *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733-741.) Respondents argue that their efforts to settle and to stipulate (e.g., to delete NRP from the Irvine action) should not be discouraged by the imposition of liability for settling and entering into releases.

Each case must be considered on its own facts. Since Collins is alleging breaches of fiduciary duty against joint venture defendants that arose in a litigation context, his theories are reasonably analogous to attorney malpractice claims, and we likewise focus on whether the acts complained of (filing of stipulations and releases in litigation, allegedly affecting related rights of a joint venture) must properly be characterized as part

of the evidentiary landscape, or as a mechanism, or as an incremental step in causing him injury; and if so, the acts were "incidental" to the core claims alleged about injury-causing or tortious conduct. (*Martinez, supra*, 113 Cal.App.4th at p. 188; also see *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1168 [stating that litigation privilege under Civil Code section 47(2) does not "bar the evidentiary use of every 'statement or publication' made in the course of a judicial proceeding," and in some cases, "when allegations of misconduct properly put an individual's intent at issue in a civil action, statements made during the course of a judicial proceeding may be used for evidentiary purposes in determining whether the individual acted with the requisite intent."].)

Alternatively, we ask if Respondents' litigation-related acts gave rise to the type of "but for" causation of injury referred to in *Navellier, supra*, 29 Cal.4th 82.

III

APPLICATION OF RULES: "ARISING FROM"

"That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*).) It still must be determined whether a defendant's alleged acts that underlie a particular cause of action were, in and of themselves, acts carried out "in furtherance of the right of petition or free speech." (*Ibid.*)

Where only a "purely business type event or transaction" forms the basis of the claim against the defendant, there is no anti-SLAPP protection, because " '[t]he

statements or writings in question must occur in connection with 'an issue under consideration or review' in the proceeding." [Citation.]' " (*Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 806, citing *Blackburn v. Brady* (2004) 116 Cal.App.4th 670, 677.) The question should be whether the plaintiff is seeking relief from the defendant for its protected communicative acts. (*Wang, supra*, at p. 806; *Robles, supra*, 181 Cal.App.4th at p. 576.) We address as issues of law how Collins's claims arose over the course of the transactions and litigation.

A. 2006 Stipulation

Collins views Cisterra's stipulation with Irvine to dismiss NRP as a party there as "a component of Cisterra's essential fraud," concerning the withholding of important information about (1) Respondents' secret formation of NRP, and (2) their exclusion of him from it, and from NRP and Cisterra's claim and recovery against Irvine. Had such information not been wrongfully withheld, Collins hypothesizes that the 2006 stipulation could even have worked in his favor, such as if Cisterra rightfully continued to acknowledge its obligations to NRP, by assigning Cisterra's interests in and recovery on the lost SDP purchase agreement to NRP. Thus, the stipulation alone was assertedly neutral in effect as to Collins's claims, which are based on allegations other than those reflected in the stipulation.

Collins thus claims that material information about the "equal joint-venture business relationship" was not disclosed by Respondents, and therefore, Respondents accomplished their ongoing fraud, "in part, by way of a stipulation." (See *Robles, supra*,

181 Cal.App.4th at p. 576.) The conduct underlying his causes of action was not solely or centrally the entry into the stipulation, even if the alleged fraud was "related to or associated with [Respondents'] litigation activity." (*Freeman, supra*, 154 Cal.App.4th 719, 729.) Instead, Collins is suing mainly on claimed breaches of duty that arose earlier in the business context and that continue. We think the 2006 litigation activity was "incidental" to Collins's primary assertions of fraud and constructive fraud, that began in 1999 and are still allegedly at stake.

Even if a cause of action was "triggered" by protected activity, it does not always arise from it. (*City of Cotati, supra*, 29 Cal.4th 69, 78.) When we examine the alleged acts that underlie these causes of action, we cannot conclude Respondents' alleged concealments of material information, before they presented the 2006 stipulation to the court, were predominantly acts of a protected petitioning character. Instead, our de novo review of the record persuades us that Collins's causes of action did not "arise from" the 2006 stipulation. Respondents were only in a position to enter into that stipulation because of their alleged underlying fraudulent concealment (1) that NRP had ongoing rights, stemming from the purchase agreement and how Cisterra pursued it, or (2) that Collins might have been affected by that disposition of NRP's claims, or (3) that Cisterra had preserved standing in the Irvine action only for itself, to the exclusion of Collins, through its creation of the Irvine confidentiality agreement. Respondents cannot show that "*but for* the [2006 stipulation] and [the Respondents'] alleged actions taken in connection with that litigation, plaintiffs' present claims would have no basis."

(*Navellier, supra*, 29 Cal.4th at p. 90; italics added.) This action does not fall under the "arising from" rubric, insofar as the 2006 stipulation is concerned.

B. 2001 Settlements and Releases

The March 2001 settlement agreement states in part, "SDP, SDVI, [and others] and Collins, for themselves, their successors, . . . fully and forever RELEASE and DISCHARGE Cisterra, and its . . . joint venturers (including [NRP]) . . . from all claims, actions . . . whatsoever (contingent, accrued, . . .) which Cisterra may now have, have had, or which may hereafter accrue, . . . in connection with, relating to, or arising out of (a) the Action, (b) the Purchase Agreement or (c) the Nobel Property [except as to Irvine and the dispute concerning the Greggs' \$600,000]." Likewise, Cisterra mutually released and discharged all of its claims against SDP and others, and Civil Code section 1542 waivers were made.

Next, in the November 2001 agreement, Collins and Cisterra settled the dispute about his claim to one third of the \$600,000 paid to the Greggs. The "Mutual General Release of Parties," provides in relevant part as follows: "Collins hereby generally releases Cisterra and all of its members . . . , from all claims, whether past, present, or future, for all liability for damages or other relief arising directly or indirectly from, related to, or sustained by reason of any of the above-referenced Dispute and any other prior dealings between Cisterra and Collins." Civil Code section 1542 is also invoked.

In reference to the 2001 settlements, Collins is seeking to prove alleged misconduct that occurred behind the scenes, that was not primarily directed toward and

did not exclusively constitute any communicative acts to a court. (See *Wang, supra*, 153 Cal.App.4th 790, 808.) Collins views Cisterra's actions in obtaining these 2001 settlement agreements as "a component of Cisterra's fraud," with respect to any NRP entitlement to recover against Irvine for lost profits. Such allegedly improper, actionable conduct did not arise in the context of Respondents' carrying out of petitioning activities and court action, but rather from their conduct in carrying out joint venture business over a long period of time, allegedly in denigration of their fiduciary duties. (See *Robles, supra*, 181 Cal.App.4th at p. 576 [anti-SLAPP statute does not shield statements made on behalf of a plaintiff who is alleging those statements were made in breach of a duty of loyalty].)

It is not now before us whether Collins's 2001 settlement agreements released all "unknown" claims against Cisterra regarding either the original SDP purchase agreement or the \$200,000 payment for assignment to Cisterra of the Greggs' right of first refusal, as the "unknown" term is applied to the present, broader claims. We review the 2001 agreements as evidentiary and as part of the overall record, and conclude only that they do not form a principal or central element of Collins's causes of action, because in the factual and legal context of this appeal, his claims of substantive breaches of duty are not founded on a characterization of the releases as protected petitioning conduct. Rather, that petitioning activity is incidental or collateral to the factual pattern of fraud and nondisclosures that is claimed.

Since Respondents have not made the requisite threshold showing, Collins was not required to establish a probability of prevailing on the merits of the claims, and we need not reach that issue. Nor can any attorney fees be awarded at this juncture, where no prevailing party has been identified. The judgment and orders are reversed. We reiterate that these conclusions of law do not reflect any evaluation of the merits of the present lawsuit.

DISPOSITION

Judgment and orders are reversed. Costs are awarded to Collins.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.